STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

NICKOLAS REDNOUR,

Plaintiff/Appellee,

vs.

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant/Appellant.

Docket No. 119187

Court of Appeals No. 216025

Oakland County Circuit Ct
No. 98-004152-NF

ROBERT E. LOGEMAN (P23789)
JAMES A. IAFRATE (P42735)
Attorneys for Plaintiff/Appellee
2950 S. State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 994-0200

KEITH P. FELTY (P47406)
Attorney for Defendant/Appellant
30100 Telegraph Rd., Ste. 250
Bingham Farms, Michigan 48025
(248) 647-9595

J. MARK COONEY (P47114)
Co-Counsel for Defendant/Appellant
4000 Town Center, Suite 909
Southfield, Michigan 48075
(248) 355-4141

DEFENDANT/APPELLANT HASTINGS MUTUAL INSURANCE COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

NICKOLAS REDNOUR,

Plaintiff/Appellee,

vs.

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant/Appellant.

Docket No. 119187

Court of Appeals No. 216025

Oakland County Circuit Ct
No. 98-004152-NF

ROBERT E. LOGEMAN (P23789)
JAMES A. IAFRATE (P42735)
Attorneys for Plaintiff/Appellee
2950 S. State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 994-0200

KEITH P. FELTY (P47406)
Attorney for Defendant/Appellant
30100 Telegraph Rd., Ste. 250
Bingham Farms, Michigan 48025
(248) 647-9595

J. MARK COONEY (P47114)
Co-Counsel for Defendant/Appellant
4000 Town Center, Suite 909
Southfield, Michigan 48075
(248) 355-4141

DEFENDANT/APPELLANT HASTINGS MUTUAL INSURANCE COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

TABLE OF CONTENTS

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

INDEX OF AUTHORITIES

Cases

Statutes

Rules

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Hasting Mutual Insurance Company requests an opportunity to be heard at oral argument. Hastings believes that the Court will benefit from an opportunity to hear the parties' analysis of the issues raised on appeal, and to have counsel respond to the Court's questions.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.301(A)(2), which provides that the Supreme Court may "review by appeal" decisions by the Michigan Court of Appeals. Furthermore, MCR 7.302(F)(3) says that if this Court grants leave to appeal a Court of Appeals' decision, "jurisdiction over the case is vested in the Supreme Court." On September 17, 2002, this Court entered an order granting Hastings Mutual's application for leave to appeal from the Michigan Court of Appeals' April 20, 2001 decision. (See Leave Order, Apx at p 71A).

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT OF QUESTIONS PRESENTED

I. "Occupying" under the auto policy:

> The Hastings Mutual auto policy excludes "PIP" coverage for out-of-state accidents unless the claimant was "occupying" the insured vehicle when injured. The policy defines "occupying" as "in, upon, getting in, on, out or off." Mr. Rednour got out of the insured car to help change a flat tire. After he loosened the lug nuts, he began walking toward the back of the car. While he was walking he was struck by a hit-and-run driver. Was Mr. Rednour "occupying" the car when hit?

Defendant-Appellant Hastings Mutual submits that the correct answer is "No."

Plaintiff-Appellee suggests that the correct answer is "Yes."

The Court of Appeals held that the correct answer is "Yes."

The trial court answered "No."

II. "Occupant" under the no-fault act:

> Section 3111 of the no-fault act defines the PIP coverage available for out-of-state accidents, and requires coverage if the claimant was "an occupant" of the insured vehicle when injured. This Court has held that "an occupant" (for purposes of §3111) is one who is physically inside a vehicle. Should §3111 control whether Mr. Rednour can recover PIP benefits, and if so, did Hastings properly deny coverage where he was admittedly outside the insured vehicle when injured?

Defendant-Appellant Hastings Mutual submits that the correct answer is "Yes."

Plaintiff-Appellee suggests that the correct answer is "No."

The Court of Appeals held that the correct answer is "No."

The trial court appeared to answer "Yes."

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATEMENT OF FACTS

A. Case Overview.

This is a first-party no-fault case concerning the availability of personal injury protection ("PIP") benefits for injuries sustained in an out-of-state accident. Plaintiff Nickolas Rednour was hit by a hit-and-run driver while walking next to a disabled car insured by Hastings Mutual Insurance Company. He sought PIP benefits from Hastings, but Hastings denied coverage because he was not "occupying" the insured vehicle when he was injured -- a prerequisite for coverage for an out-of-state accident. Plaintiff sued, and the trial court granted Hastings's motion for summary disposition. The Court of Appeals reversed, holding that the Hastings policy defined "occupying" more broadly than the no-fault act requires, and that the plaintiff was "occupying" the insured vehicle when he was injured. This Court granted Hastings's application for leave to appeal the Court of Appeals' decision.

B. The Accident.

In the early-morning hours on March 2, 1997, plaintiff was driving his friend Bill Tarchalski's car southbound on Interstate 280 in Ohio. (Amended Complaint at ¶6, Apx at p 41A; see also Accident Report at p 1, Apx at p 36A). Mr. Tarchalski was insured by Hastings under a personal auto policy. (See Policy, Apx at p 10A). While plaintiff was driving, the car's driver's-side rear tire became flat. (Complaint at ¶6, Apx at p 41A). After passing over a bridge, plaintiff pulled the car off the road and onto the shoulder of the southbound lane. (*Id* at ¶7, Apx at p 41A; see also Accident Report at p 1, Apx at p 36A).

According to plaintiff's statement to investigating police, he and Mr. Tarchalski "got out" of the car to take care of the flat tire:

> Me and Bill got out to get stuff to change the tire.
>
> [Accident Report at p 1, Apx at p 36A.]

Plaintiff explained that he removed the lug nuts from the flat tire, and then stood up and started to walk toward the back of the car when he saw a vehicle approaching:

> I bent down and broke the lug nuts free and I stood up. I started to walk towards the back of the car when I saw the vehicle.
>
> [*Id.*]

Plaintiff noticed that this oncoming vehicle was swerving towards Mr. Tarchalski's car, and moments later plaintiff was hit, despite trying to turn away from the oncoming vehicle. See *id.* According to plaintiff's complaint, after impact he was "knocked into and off of" Mr. Tarchalski's car. (Complaint at ¶8, Apx at p 41A).

The investigating officer asked plaintiff more specific questions concerning his location at the moment of impact. Plaintiff confirmed that he was standing with both feet on the ground and was starting to turn toward Mr. Tarchalski's car, but that he wasn't touching the car:

> Q: What position were you in when you were struck?
>
> A: Standing with both feet on the ground. I had just started to turn towards the car.
>
> Q.: Were you up against the vehicle?
>
> A: ***I wasn't touching the car***, but maybe 6 inches away from it, if that.
>
> [Accident Report at p 2, Apx at p 37A (emphasis added).]

C. The Policy.

At the time of the accident, plaintiff's friend Bill Tarchalski was insured by Hastings under a personal auto policy. (See Policy, Apx at p 10A). The policy included an endorsement concerning "Personal Injury Protection Coverage--Michigan." (See *id*, Apx at p 18A). The PIP coverage insuring agreement provided that "[t]hese benefits are subject to the provisions of the Michigan Insurance Code." (*Id*, Apx at p 19A).

Under the policy, Hastings would pay PIP benefits to an "insured" who sustained bodily injury caused by an auto accident. (See *id*, Apx at p 19A). The policy defined "insured" as the named insured ("you") or the named insured's resident relatives (any "family member"), or "[a]nyone else injured in an auto accident . . . [w]hile 'occupying'" the named insured's covered auto. (See *id*, Apx at pp 18A-19A). It is undisputed in this case that plaintiff was not the named insured under the Hastings policy -- plaintiff's friend Bill Tarchalski was the named insured. (See *id*, Apx at p 10A). Nor has there been any claim that plaintiff was Mr. Tarchalski's resident-relative at the time of the accident. Instead, plaintiff's status as an "insured" depends on whether he was "occupying" Mr. Tarchalski's car when injured.

The Hastings policy also contained a specific policy exclusion for out-of-state accidents (such as this Ohio accident). This exclusion precluded PIP coverage for bodily injury sustained while *not* "occupying" the motor vehicle:

> **EXCLUSIONS**
>
> **A.** We do not provide Personal Injury Protection Coverage for "bodily injury":
>
> * * *
>
> 3. Sustained by any "insured" while not "occupying" an "auto" if the accident takes place outside Michigan. However, this exclusion (A3.) does not apply to:
>
> a. You; or
> b. Any "family member."
>
> [*Id*, Apx at pp 19A-20A.]

Thus, because this accident occurred in Ohio the policy excluded PIP coverage if plaintiff was injured while not "occupying" Bill Tarchalski's car (presuming that plaintiff could satisfy the insuring agreement's definition of "insured" in the first place).

These provisions mirror §3111 of the no-fault act, which provides that PIP benefits are payable for injuries sustained in out-of-state auto accidents only if the injured person was: (1) at the time of the accident a named insured, (2) a named insured's "spouse" or "a relative of either domiciled in the same household," or (3) "***an occupant*** of a vehicle involved in the accident." MCL 500.3111 (emphasis added).

The Hastings policy included the standard ISO personal-auto-policy definition of the term "occupying":

> G. "Occupying" means in, upon, getting in, on, out or off.
>
> [See Policy at p 1, Apx at p 23A.]

D. The Trial Court Proceedings.

Plaintiff claimed PIP benefits under Mr. Tarchalski's auto policy, but Hastings denied coverage because plaintiff was not an occupant of Mr. Tarchalski's car when he was injured. Plaintiff sued Hastings, alleging breach of contract based on its refusal to pay benefits, and seeking a declaration that there was coverage. (See Amended Complaint, Apx at pp 40A-44A).

Hastings moved for summary disposition, arguing that the undisputed facts showed that plaintiff was not an "occupant" of Mr. Tarchalski's car at the time of the accident, and that he was therefore not entitled to PIP benefits.

Hastings emphasized that this case implicates the no-fault act's statutory PIP coverage scheme, and in particular the no-fault provision defining PIP coverage for out-of-state accidents: MCL 500.3111. It argued that the issue was therefore controlled by the Michigan Supreme Court's decision in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520 (1993), where this Court held that a claimant is only "an occupant" of a vehicle under §3111 if the claimant was "physically inside" the insured vehicle when injured. See *id* at 531-532. Therefore,

Hastings argued, plaintiff was not "an occupant" of the car at the time he was injured because he was not physically inside the car.

Plaintiff opposed summary disposition, arguing that the Hastings policy provided broader coverage than the statutory-minimum coverage defined in §3111. At the hearing on Hastings's motion, plaintiff's counsel was more specific. He argued that plaintiff could satisfy the policy's definition of the term "occupying" -- and therefore avoid the policy's exclusion for out-of-state accidents -- because plaintiff was "upon" Mr. Tarchalski's car when he was injured. (See Hrg Tr at p 12, line 20 - p 13, line 10, Apx at pp 57A-58A). Plaintiff's counsel argued that plaintiff was "upon" the car because he was "changing a tire and he is actually struck by a car and in his statement at the scene he says that he got pinned into it." *Id.*

E. The Trial Court's Decision.

Former Wayne County Circuit Judge J. Phillip Jourdan, presiding over this Oakland County Circuit Court case as a visiting judge, granted Hastings's motion for summary disposition. Although Judge Jourdan accepted plaintiff's claim that an insurance policy can provide broader coverage than that mandated by the no-fault act, he rejected the notion that plaintiff was "occupying" the insured vehicle when he was admittedly outside it:

> [T]he way I read the exclusion, Section A-3 under Exclusions, Section A says: "We don't provide PIP benefits for bodily injury sustained by an insured while not occupying an auto if the accident takes place outside Michigan."
>
> And then counsel is suggesting that because this guy was somewhere near the auto and whoever hit him knocked him into the auto that that should come under the section that says upon, I disagree. I mean he was outside the auto. I think he should be able to get PIP benefits, but I don't think he can under this particular policy, and I will -- I will grant summary disposition as to defendant's request.
>
> [Hrg Tr at pp 14-15, Apx at pp 59A-60A.]

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

Plaintiff moved for reconsideration, but Judge Jourdan denied the motion. Plaintiff then appealed to the Michigan Court of Appeals.

F. The Michigan Court of Appeals' Decision.

The Michigan Court of Appeals reversed Judge Jourdan's decision, finding that plaintiff was "occupying" Mr. Tarchalski's car when he struck by the hit-and-run driver. See *Rednour v Hastings Mut Ins Co*, 245 Mich App 419 (2001).

The Court of Appeals panel first concluded that the coverage afforded under the Hastings policy was "indisputably broader than the statutory coverage under §3111 of the no-fault act." *Id* at 424. The panel announced that "the policy controls," and that it was therefore required to determine the parties' intent based on the policy language alone. *Id.* Thus, the panel did not feel constrained by this Court's decision in *Rohlman*, which interpreted the term "occupant" in §3111 to require that the claimant be physically inside the insured vehicle. See *Rednour*, 245 Mich App at 423.

The panel also apparently did not feel constrained by the Court of Appeals' 1994 published decision in *Rohlman* (on remand from this Court), in which the Court of Appeals held that in order to be "upon" an insured vehicle -- and therefore satisfy the standard ***policy*** definition of the term "occupying" -- a claimant must be in "physical contact" with the covered vehicle at the time of the accident. See *Rohlman v Hawkeye-Security Ins Co (On Remand),* 207 Mich App 344, 357 (1994). Instead of following this physical-contact rule, the *Rednour* panel decided, in essence, that plaintiff was close enough to Mr. Tarchalski's car to be considered an occupant at the time he was struck by the hit-and-run driver:

> We cannot conclude that the parties to the insurance agreement at issue intended that the broad definition of "occupying" used in the policy would exclude the circumstances of plaintiff's injury in this case. Plaintiff sustained injuries as the driver of a temporarily-disable automobile, upon getting out of the vehicle and proceeding to repair a flat tire. The parties could not have

> intended that the driver of an automobile would be covered for PIP benefits if struck by a vehicle as he was stepping out of the vehicle's doorway, but not if struck the moment his body had moved from the door threshold to the vehicle's tire. Plaintiff was within 6 inches of the vehicle, still in sufficient contact with the vehicle so as to be pinned against it upon impact, and surely within the context of "in, upon, getting in, on, out or off" the vehicle, having been in physical contact with the vehicle upon impact.
>
> [*Rednour*, 245 Mich App at 425.]

On September 17, 2002, this Court granted Hastings's application for leave to appeal the Court of Appeals' decision. For the reasons to be discussed below, this Court should reverse the Court of Appeals' decision, and reinstate the trial court's order granting Hastings's motion for summary disposition.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STANDARD OF REVIEW

This Court reviews "the resolution of a summary disposition motion de novo." *Brunsell v City of Zeeland*, 467 Mich 293, 295 (2002).

A question "regarding the import of a contractual term of an insurance policy" is "a question of law that [this Court] review[s] de novo." *Morley v Automobile Club of Michigan*, 458 Mich 459, 465 (1998). Likewise, "the interpretation and application of a statute" is "a question of law that [this Court] review[s] de novo." *Miller v Mercy Mem'l Hosp Corp*, 466 Mich 196, 201 (2002).

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

ARGUMENT I

The Court of Appeals committed reversible error by (1) straining the unambiguous policy definition of "occupying" so that a claimant who was admittedly outside, and not touching, the insured vehicle was still "upon," and thus "occupying," that vehicle; and (2) ignoring binding Court of Appeals precedent dictating that the standard policy definition of "occupying" requires physical contact with the insured vehicle at the time of injury.

The Court of Appeals erred in reversing the trial court's grant of summary disposition in favor of Hastings. Even if it were assumed that the Court of Appeals properly ignored the no-fault provision controlling PIP coverage for out-of-state accidents (and this Court's precedent interpreting it), under the policy plaintiff was only entitled to PIP benefits if he was "occupying" the insured car when he was injured. The policy defines "occupying" as "in, upon, getting in, on, out or off" the insured car. Here, plaintiff cannot satisfy that definition because he admittedly had already gotten out of, and was not touching, the insured car when struck by a hit-and-run driver. The Court of Appeals improperly strained the plain meaning of the policy language to find coverage. It also completely ignored a previous, published Court of Appeals decision that it was bound to follow under MCR 7.215(I)(1), which held that the definition of "occupying" can only be satisfied where the claimant was in physical contact with the vehicle when injured. This Court should reverse the Court of Appeals' decision and reinstate the trial court's grant of summary disposition in favor of Hastings.

A. The Court of Appeals was bound by settled precedent admonishing Michigan courts not to expand insurance coverage by perverting the meaning of plain policy language or declaring "ambiguity" where none exists.

This Court's recent decisions have reaffirmed that it is inappropriate for Michigan courts to broaden the scope of insurance-contract terms by perverting their plain meaning or declaring ambiguity where none truly exists.

When reviewing an insurance policy, Michigan courts "must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles of contract construction." *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353 (1999). "First, an insurance contract must be enforced in accordance with its terms." *Id* at 354. "Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise." *Id.* "Thus, the terms of the contract must be enforced as written where there is no ambiguity." *Id.* "A court must not hold an insurance company liable for a risk that it did not assume." *Id.*

Michigan courts will construe an insurance policy in the insured's favor if ambiguous terms are found. But "this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured." *Id.* "Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly-used meanings." *Id.*

A court should not declare an insurance-policy term ambiguous simply because a dictionary might define the term in different ways, or because the parties to an insurance-coverage dispute attribute different meanings to a term. "Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism." *Id.* And "[t]he fact that each party is advocating a definition that supports its desired outcome in a case of first impression does not make a phrase ambiguous." *Id* at 355 n3. "If this were the test, all terms and phrases would be rendered ambiguous." *Id.*

This Court has applied these rules while interpreting auto policies. For instance, in *Farm Bureau Ins Co v Nikkel*, 416 Mich 558 (1999), this Court refused to find ambiguity in an auto policy's definition of the term "non-owned automobile," declining the insured's

"invitation to discern ambiguity solely because an insured might interpret a term differently than the express definition provided in a contract." *Id* at 567.

B. Before the Court of Appeals ruled in this case, this Court had already held that claimants have to be physically inside an insured vehicle to be considered "an occupant" under §3111 of the no-fault act, and the Court of Appeals had already held that only those in physical contact with an insured vehicle could satisfy the standard policy definition of "occupying."

The Court of Appeals' decision that plaintiff was "occupying" Mr. Tarchalski's car when hit -- even though he admittedly wasn't even touching it -- is at odds with decisions by this Court, and prior Court of Appeals panels, requiring that a claimant be in physical contact with an insured vehicle in order to be considered its occupant.

1. This Court's *Rohlman* decision.

In the Michigan Supreme Court's 1993 opinion in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520 (1993), it observed that "the definition of occupant has been the source of many disputes and has caused as many courts to agonize over what the definition should be." *Id* at 527. The Court was "determined to resolve the confusion."

Like the plaintiff in the present case, the plaintiff in *Rohlman* was struck by a hit-and-run driver in Ohio. The plaintiff was a passenger in friend's minivan when a small trailer attached to the minivan became unhitched and overturned, coming to rest on the highway. The driver turned the minivan around and parked near the trailer, and the plaintiff got out and walked 10-20 feet to the trailer to retrieve it. A few minutes later, the plaintiff was struck by a hit-and-run driver.

The plaintiff sought PIP benefits from the minivan owner's insurer, Hawkeye. The plaintiff also sought uninsured-motorist benefits. Hawkeye denied benefits because the plaintiff was not an occupant of the minivan when he was injured, and the plaintiff sued. The

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

trial court denied Hawkeye's motion for summary disposition, holding that the plaintiff was an "occupant" of the minivan when he was injured. The Michigan Court of Appeals affirmed.

The Michigan Supreme Court reversed, holding that the plaintiff was not entitled to PIP benefits because he was not "an occupant" of the insured minivan as required by §3111. The Court emphasized that the proper approach for defining "occupant" was to give the term "its primary and generally understood meaning." *Id* at 532. In addition, the Court observed that other no-fault provisions distinguished "occupying" from "entering into" and "alighting from" vehicles. This led the *Rohlman* Court to "conclude that the plaintiff was not an occupant of the van because he was not ***physically inside*** the van when the accident occurred." *Id* (emphasis added).

It is thus settled that in order for a claimant to be considered "an occupant" under §3111, the claimant must have been physically inside the vehicle at the time he or she was injured; in other words, this Court gave the term "occupant" its plain and commonly-understood meaning.

2. The Michigan Court of Appeals' *Rohlman* decision on remand -- which established the physical-contact threshold for satisfying the standard *policy* definition of "occupying."

The *Rohlman* Court didn't address all of the issues raised in that case because the factual record wasn't sufficiently developed. The primary issue that the *Rohlman* Court declined to address was whether the plaintiff was entitled to uninsured-motorist benefits. On remand the Court of Appeals *did* address this issue, and was guided by this Court's "plain meaning" approach.

Under the facts of *Rohlman*, the plaintiff could only qualify for uninsured-motorist benefits if he was "occupying" the covered auto at the time of injury. Because the uninsured-motorist coverage was purely contractual, the Court of Appeals' decision hinged on its

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

interpretation of the *policy* definition of "occupying." The Hawkeye policy defined "occupying" in the same way that the term is defined in the standard ISO Personal Auto Policy "Definitions" form found in the Hastings policy in the present case:

> The term "occupying" is defined in the policy as "*in, upon, getting in, on, out or off.*"
>
> [207 Mich App at 351 (emphasis added).]

The Court of Appeals observed that the plaintiff's own allegations showed that he was not "in" the minivan when he was struck by the hit-and-run driver. Likewise, the court concluded that he was not getting in, getting on, getting out, or getting off the minivan at the time he was injured -- noting that the word "getting" clearly modified each of the four words in the series that followed it: "in, on, out, or off." 207 Mich App at 351.

As in the present case, the only remaining question in determining whether the plaintiff was "occupying" the insured minivan was whether the plaintiff was "upon" the minivan when struck by the hit-and-run driver. See *id.* In analyzing this question, the Court of Appeals majority acknowledged that the definition of "occupying" at issue was common to the automobile-insurance industry, and that its interpretation of that definition would therefore have far-reaching consequences:

> While we acknowledge that the interpretation of a private-party contract may not have the ramifications of the interpretation of a statute, we recognize that the policy definition of "occupying," i.e., "in, upon, getting in, on, out or off" is relatively common in the automobile insurance industry. Our interpretation of these words in this policy will have consequences far beyond the interpretation of this private-party contract and the situation presented here. With that in mind, we proceed with the task.
>
> [*Id* at 353-354.]

The Court of Appeals majority then followed this Court's lead in refusing to apply a "broad, strained interpretation of language in an insurance policy." *Id* at 355. Instead, the Court of Appeals gave the word "upon" its commonly-understood meaning, which is synonymous and

interchangeable with the word "on." See *id* at 356. The Court of Appeals thus concluded that "the term 'upon' in the definition of 'occupying' means, ***at a minimum***, some ***physical contact*** with the covered auto." *Id* at 357 (emphasis added).

Having carefully considered the various dictionary definitions of "upon," the Court of Appeals majority in *Rohlman* explicitly rejected the notion that a claimant simply needs to be in close proximity to the insured vehicle in order to be "upon" that vehicle:

> We doubt that anyone would argue that the parties to the insurance contract intended that the word "upon" be used in the sense of "approximate contact . . . with an attacker" or "in close proximity . . . with an attack." Moreover, we are convinced that the parties did not intend that "upon" should be interpreted as "immediate proximity." That interpretation would provide (and require payment for) supplemental coverage in the form of uninsured motorist benefits for anyone who happens to be near the covered auto and injured when the auto is struck by an uninsured motorist even though the person has no connection with the owner, named insured, or covered vehicle.
>
> [*Id* at 356-357.]

In summary, on remand in *Rohlman* the Court of Appeals determined that in order for a claimant to satisfy the "upon" component of the standard auto-policy definition of "occupying," the claimant must, at a minimum, establish that he or she was in actual physical contact with the insured vehicle when the accident occurred. The Court of Appeals explicitly rejected the notion that simply being very close to the insured vehicle is sufficient to be considered "upon," and thus "occupying," the vehicle.

C. The Court of Appeals panel in the present case was bound to follow the Court of Appeals' previous, published decision in Rohlman.

A series of administrative orders entered by this Court in the 1990s mandated that the Court of Appeals follow its prior, published decisions issued on or after November 1, 1990. See Admin. Order Nos. 1990-6, 1994-4, and 1996-4; see also *Golden v Baghdoian*, 222 Mich App 220, 224 (1997). This directive was eventually memorialized in MCR 7.215(I), which,

like the administrative orders that preceded it, explicitly requires the Court of Appeals to follow the rules of law established in its published decisions issued on or after November 1, 1990:

> (1) *Precedential Effect of Published Decisions.* A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.
>
> [MCR 7.215(I).]

In the present case, the Court of Appeals panel was required to follow its published 1994 decision in *Rohlman*. The Court of Appeals' *Rohlman* decision was issued on November 7, 1994, and therefore it was the Court of Appeals' first published decision after November 1, 1990 that interpreted the standard auto-policy definition of "occupying," and in particular the "upon" component of that definition.[1] That same term was at issue in the present case.

Had the Court of Appeals followed its previous holding in *Rohlman* as required by MCR 7.215(I), it would have reached the opposite -- and correct -- result. The Court of Appeals' 1994 *Rohlman* decision dictates that "the term 'upon' in the definition of 'occupying' means, at a minimum, some physical contact with the covered auto." 207 Mich App at 357. In the present case, plaintiff admitted that he was not in contact with the insured vehicle when he was struck by the hit-and-run driver. When an investigating police officer asked plaintiff

[1] *Gentry v Allstate Ins Co*, 208 Mich App 109 (1994) was released a short time after *Rohlman*, on December 19, 1994. In *Gentry*, the panel followed the "expansive interpretation of the term 'occupying'" that was adopted in this Court's decision in *Nickerson v Citizens Mutual Ins Co*, 393 Mich 324 (1975) (which is discussed later in this brief). The *Gentry* claimants were standing on the passenger side or their disabled car when a second vehicle slammed into the car's driver's side and pushed the disabled car onto the claimants. The Court of Appeals found that they were "occupying" their car when injured. The "expansive interpretation" used by the *Gentry* panel is at odds with the Court of Appeals' earlier decision in *Rohlman*, as well as the principles of contract interpretation repeatedly articulated by this Court in its more modern decisions. And until its decision in this case, the Court of Appeals seemed to be diligent in according the term "occupying," and the terms used to define it, their plain meaning. See *Auto-Owners Ins Co v Harvey*, 219 Mich App 466 (1996)(observing that it was bound to follow the Court of Appeals' *Rohlman* decision because it was released before *Gentry*, declaring that *Rohlman* reached "the correct result," and enforcing the *Rohlman* majority's physical-contact requirement).

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

specifically where he was at the time of impact, plaintiff admitted that he "wasn't touching the car." (Accident Report at p 2, Apx at p 37A). Under the Court of Appeals' 1994 *Rohlman* decision, plaintiff was not "upon" the insured vehicle when struck because he wasn't in physical contact with the vehicle. Moreover, the Court of Appeals' *Rohlman* decision dictated that plaintiff could not be considered to have been "upon" the insured vehicle simply because he was in close proximity to it.

The Court of Appeals had no justification for ignoring its own binding precedent in violation of MCR 7.215(I).

Of course, this Court is not bound to follow the published decision released by the Court of Appeals in *Rohlman*, but as will be explained below, the Court of Appeals' post-remand *Rohlman* decision was correct, and embodied the principles articulated by this Court in *its Rohlman* opinion.

Plaintiff will likely attempt to distinguish the Court of Appeals' *Rohlman* decision because the question there was whether the plaintiff was entitled to uninsured-motorist benefits, but the question in the present case is whether plaintiff is entitled to recover PIP benefits for an out-of-state accident. This is a distinction without a difference. The bottom line is that in both *Rohlman* and the present case, the Court of Appeals considered the identical policy language: the "upon" component of the standard auto-policy definition of "occupying." Because the Court of Appeals panel in the present case found that policy language to be dispositive, it was bound to follow its previous, published interpretation of the same language.

Unlike the Court of Appeals panel in the present case, the majority in *Rohlman* applied the plain meaning of the language agreed to by the contracting parties, and refrained from imposing its own terms on the parties under the guise of resolving some unidentified "ambiguity."

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

D. The Court of Appeals' decision was also defective in that it failed to enforce the plain, commonly-understood meaning of the parties' contract terms, and instead imposed its own, more expansive, interpretation of those terms without identifying any actual ambiguity in the contract terms.

The controlling insurance policy terms are plain and unambiguous, and when enforced as written do not provide PIP coverage to plaintiff. That is, even if it were assumed that the Court of Appeals was correct in disregarding §3111 and instead applying the *policy* definition of "occupying," plaintiff cannot satisfy the policy definition.

1. Plaintiff was not "in, upon, getting in, on, out or off" the insured vehicle when injured, and therefore was not "occupying" it.

Once again, the policy defines the term "occupying" to mean "in, upon, getting in, on, out or off." (Policy at p 1, Definition G, Apx at p 23A).

There is no dispute concerning the fact that plaintiff was not "in" Mr. Tarchalski's car when he was struck by the hit-and-run driver. Indeed, plaintiff has admitted that he "certainly wasn't in" the car when he was hit. (See Hrg Tr at p 11, lines 22-24, Apx at 56A).

Likewise, there is no plausible claim that plaintiff was "getting in, on, out or off" of Mr. Tarchalski's car when he was struck by the hit-and-run driver. As a preliminary point, it is noteworthy that the Court of Appeals panels in *Rohlman* and the present case both agreed that the word "getting" modifies all of the words in the series of words that follows it. In *Rohlman,* the Court of Appeals concluded "that the words 'out or off' must be read in connection with the preceding word 'getting,'" so that "[i]f the injured person were 'getting out or off' the covered auto, then the person would be considered to be 'occupying' it." 207 Mich App at 351. And the court also "conclude[d] that the word 'on,' following 'getting in' and preceding 'out or off,' must also be considered together with the word 'getting' in order to distinguish it from the word 'upon,' commonly used as the equivalent of 'on.'" *Id.* In the present case, the Court of

Appeals agreed with that interpretation. See *Rednour*, 245 Mich App at 425 n7 ("the words 'out or off' are most reasonably read in connection with the preceding word 'getting' to mean 'getting out or off.'").

In other words, a person is "occupying" a vehicle if he or she is getting in, getting on, getting out, or getting off that vehicle. Giving these terms their plain and commonly-understood meaning, there is no plausible basis to suggest that plaintiff satisfies the definition of "occupying" based on the "getting in, on, out or off" component. Plaintiff had already gotten out of the car, loosened the lug nuts, stood up, and began walking towards the back of the car before he was hit. Therefore, he was not in the process of "getting out" of Mr. Tarchalski's car when he was struck.

Nor was plaintiff "getting in" the car when he was hit. To the contrary, he and Mr. Tarchalski were outside the vehicle with the intention of remaining outside the vehicle to change the flat tire.

Likewise, plaintiff wasn't "getting on" Mr. Tarchalski's car when he was struck. Rather, he was walking from the area near the driver's-side rear tire toward the back of the vehicle to "get stuff out to change the tire." (Accident Report at p 1, Apx at p 36A).

And plaintiff wasn't "getting off" the car, either. He told investigating police that when he was struck his feet were on the ground and he was walking from the area where he had just loosened the lug nuts toward the back of the car.

Plaintiff was not getting in, getting on, getting out, or getting off Mr. Tarchalski's car when he was struck by the hit-and-run driver.

This leaves the question of whether plaintiff was "upon" the car when struck by the hit-and-run driver. As the majority of the Court of Appeals panel recognized in *Rohlman,* when given its plain meaning, the word "upon" is interchangeable with the word "on." The two

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

words are synonymous. See 207 Mich App at 355-356. And a person cannot be on a car without having some physical contact with it.

In fact, the "minimum" requirement of "some physical contact" established by the Court of Appeals in *Rohlman* is still rather generous, and could lead to very broad coverage obligations. In truth, being "upon" a car -- just like being "on" a car -- denotes, in contemporary usage, that the car is in some way providing physical support to the person who is "upon" or "on" it. It would indeed strain the common meaning of these terms to suggest that a person standing next to a car, and touching the side of the car with his or her index finger, is "upon" the car.

But in the present case there is no need to split hairs or determine the number of angels that are dancing on the head of the proverbial pin. Plaintiff wasn't "upon" Mr. Tarchalski's car when he was hit. He was standing next to it. Plaintiff's own complaint confirms that the only physical contact plaintiff had with Mr. Tarchalski's car (after getting out and loosening the lug nuts) was after he was hit by the hit-and-run vehicle and "knocked into and off of" the car. (Complaint at ¶8, Apx at p 41A). Because plaintiff was not "upon" the car when he was struck by the hit-and-run driver, he was not "occupying" the car. Therefore, the insurance policy, like section §3111 of the no-fault act, affords plaintiff no PIP coverage.

Plaintiff cannot satisfy the "physical contact" requirement established by the Court of Appeals in *Rohlman* simply because he suggests that he was "pinned" against Mr. Tarchalski's car for a moment after impact. The fact that a claimant is propelled into an insured vehicle after getting hit by a car cannot properly support a finding that he or she was "occupying" the insured vehicle at the time of injury. To take plaintiff's contrary argument to its logical extreme quickly reveals its logical shortcomings. In plaintiff's view, the claimant could be a pedestrian 40 feet from an insured vehicle, and could be struck by a hit-and-run driver and thrown 40 feet into the insured vehicle, and be deemed to have been "occupying" the insured

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

vehicle when injured. That view is strained and unreasonable. In short, a claimant's status as an occupant or non-occupant of an insured vehicle cannot rest on something so fortuitous as the direction in which he or she is propelled after being struck by a hit-and-run driver.

2. The Court of Appeals panel impermissibly strained the plain meaning of the parties' contract, and attempted to justify it by resorting to the rules on ambiguity even though the panel never identified any ambiguity.

In its opinion in this case, the Court of Appeals repeatedly alluded to the rule that "ambiguous" policy language is to be construed against the insurer. See, e.g., *Rednour*, 245 Mich App at 424. But the panel did not actually identify any ambiguous terms. Without having identified any ambiguous term or terms in the policy's definition of the word "occupying," the panel simply stated -- in conclusory fashion -- that "[t]he words 'in, upon, getting in, out or off' are subject to interpretation." See *id* at 425. And from this false premise the panel justified deciding for itself what the parties to this insurance contract must have really intended – unconstrained by the plain terms contained in the parties' insurance contract. See *id.* This approach offends settled rules of contract interpretation. "[T]he terms of the contract must be enforced as written where there is no ambiguity." *Henderson,* 460 Mich at 354.

The Court of Appeals' analysis, when broken down to its essence, was that plaintiff was simply *close enough* to the insured vehicle to deserve coverage. Indeed, reviewing the panel's actual "analysis" reveals a conspicuous disinterest in the actual policy terms:

> The parties could not have intended that the driver of an automobile would be covered for PIP benefits if struck by a vehicle as he was stepping out of the vehicle's doorway, but not if struck the moment his body had moved from the door threshold to the vehicle's tire. Plaintiff was within 6 inches of the vehicle, still in sufficient contact with the vehicle so as to be pinned against it upon impact, and surely within the context of "in, upon, getting in, on, out of off' the vehicle, having been in physical contact with the vehicle upon impact.
>
> [*Rednour*, 245 Mich App at 425.]

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

The actual terms defining the meaning of "occupying" were relegated to an off-hand reference in this discussion, with the court's emphasis shifting instead to the perceived fairness or logic of parties contracting to provide coverage for someone injured while getting out of a vehicle, versus someone standing outside a vehicle and not touching it. But the Court of Appeals was no more justified in questioning the providence of the contracting parties' coverage agreement than it would have been in questioning the Michigan Legislature's decision to provide PIP benefits under §3111 for a person physically inside an insured vehicle, but not for somebody "entering into" or "alighting from" the vehicle. See *Rohlman*, 442 Mich at 531. At some point the parameters on coverage must be drawn -- whether by the Legislature or the parties. The Court of Appeals panel in the present case did not have the prerogative to redraw those lines simply because it was unsatisfied with the parameters agreed to by the parties.

What is most troubling about the Court of Appeals' approach is that it not only broadened the policy's definition of "occupying" without identifying a single ambiguous term, but it did so having *already* expressed the opinion that the Hastings policy afforded *broader* coverage than that afforded by §3111. In other words, the Court of Appeals initially declared that the standard ISO-form definition of "occupying" grants more generous coverage than that offered by Michigan's no-fault act, but *still* saw fit to *further* enlarge Hastings's coverage obligation by broadly interpreting this already-generous language. While plaintiff's injury was certainly unfortunate, Michigan jurisprudence is hardly furthered by imposing a strained interpretation on standard insurance-industry language out of sympathy to a single injured person. "The fact that a person may not be covered by insurance on a rare occasion . . . is not reason to give policy language an interpretation that is inconsistent with dictionary definitions, common understanding, or the intent of the parties." *Rohlman*, 207 Mich App at 355.

There is an old saying in the law: "Tough cases make bad law." The Court of Appeals made bad law in this case. As the Court of Appeals had earlier recognized in *Rohlman*, the

interpretation of the policy term "occupying" will have "consequences far beyond the interpretation of this private-party contract and the situation presented here, given the industry-wide use of that same definition. See *id* at 353-354. The Court of Appeals panel in the present case paid no heed to this reality.

3. Plaintiff's reliance on this Court's 1975 decision in *Nickerson v Citizens Mut Ins Co* is misplaced where this Court has observed that its reasoning is no longer persuasive.

In his Court of Appeals brief, plaintiff relied heavily on this Court's 1975 decision in *Nickerson v Citizens Mut Ins Co*, 393 Mich 394 (1975). In *Nickerson*, the Court held that the claimant, who was standing outside a disabled vehicle waiting for assistance, was nevertheless "occupying" the insured vehicle when it was struck from behind and pushed into him. The court found that the plaintiff had been "occupying" the insured vehicle immediately before the accident, and because his injury arose out of its use or repair, he was entitled to uninsured-motorist protection. The *Nickerson* Court's primary motivation for declaring that a person standing outside a vehicle was nevertheless "occupying" the vehicle seemed to be the fact that the plaintiff had no other available means of recovery if uninsured motorist benefits were unavailable. And as the Court of Appeals later observed in *Rohlman*, the *Nickerson* Court employed "a broad, obviously strained construction" that "was adopted for the purpose of finding coverage." *Rohlman*, 207 Mich App at 352-353, 354-355.

The extent of the Court of Appeals' reliance on *Nickerson* in this case is unclear, but the panel did cite to *Nickerson* after suggesting that it was obligated to "construe ambiguous policy language against the insurer." See 245 Mich App at 426. The Court of Appeals' reluctance to overtly rely on *Nickerson* can no doubt be attributed to the fact that both this Court and the Court of Appeals have, on a number of occasions, recognized that *Nickerson* is no longer viable precedent.

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

For instance, in *Rohlman* this Court took issue with the lower courts' heavy reliance on *Nickerson*, noting that *Nickerson* was released before the no-fault act was adopted, and that "the repeal of the uninsured motorist statute and passage of the no-fault act largely eliminated the motivating factors underlying the *Nickerson* decision." 442 Mich at 529.

The *Nickerson* Court's decision, although well-meaning, represents an intolerable departure from the plain meaning of the contract terms that were actually agreed to by the parties. This Court's modern precedent dictates that courts should not change the plain meaning of contract terms in order to provide coverage where the commonly-understood meaning of the policy terms does not support a finding of coverage. To the extent that it has not done so already, this Court should take this opportunity to announce that the approach adopted in *Nickerson* is at odds with well-settled rules of contract interpretation, and that such a marked departure from the plain meaning of contract terms cannot be justified by the desire to provide coverage to a sympathetic plaintiff in a particular case. Once again, as *Nickerson* shows, tough cases make bad law.

This Court should forcefully declare that the death knell has rung on the days when claimants could successfully claim to have been "occupying" an insured vehicle simply because they were near it.

ARGUMENT II

The Court of Appeals erred in holding that §3111 of the no-fault act does not govern in this case, and that this Court's *Rohlman* holding therefore does not apply.

The Court of Appeals erred in holding that §3111 of the no-fault act does not govern whether plaintiff is entitled to no-fault PIP benefits for injuries sustained in this out-of-state accident. The coverage question in this case hinges on whether plaintiff was an occupant of the insured vehicle when injured. In *Rohlman*, this Court held that courts must answer that

question by interpreting the no-fault act, rather than individual policies, where the policy's coverage is directed by the no-fault act and the language in the policy is intended to be consistent with the act. The Court of Appeals improperly concluded that the standard insurance-industry language embodying the no-fault act's legislative grant of PIP coverage for certain out-of-state accidents was intended to *expand* the scope of the PIP coverage beyond that required by the no-fault act. The Court of Appeals should have applied §3111 of the no-fault act to determine whether plaintiff was entitled to no-fault PIP benefits, and should have held that plaintiff was not entitled to benefits because he was not "an occupant" of the insured vehicle when injured.

A. This Court has recognized that where an insurance policy provides coverage directed by the no-fault act, and which is intended to be consistent with the no-fault act, that policy should be interpreted in a manner consistent with the no-fault act.

In this Court's 1993 *Rohlman* decision, it acknowledged the potential for questions concerning whether the no-fault act and the standard insurance-industry forms provide identical coverage where the policy language is not a perfect, word-for-word match with the statutory language found in the act. See *Rohlman*, 442 Mich at 530, n10. Michigan auto policies are typically augmented by the "Personal Injury Protection Coverage-Michigan" ISO form that reflects the statutory obligation to provide the PIP coverage required by the no-fault act. But by practical necessity, that standardized form must do more than literally regurgitate the actual no-fault act provisions, and also must be coordinated to the extent possible with the standard ISO forms that comprise the "main" policy.

In recognition of this practical reality, the standardized Michigan PIP endorsement includes a provision announcing that the PIP coverage described in the endorsement is offered subject to the Michigan Insurance Code's provisions -- which includes the no-fault act:

II. PERSONAL INJURY PROTECTION COVERAGE

INSURING AGREEMENT

* * *

B. These benefits are subject to the provisions of the Michigan Insurance Code. . . .

[See Policy, Michigan PIP Endorsement, at p 2, Apx at 19A.]

In order to alleviate possible tension between the actual no-fault provisions and the policy language designed to embody the no-fault act's mandate, the *Rohlman* Court expressed a preference for applying pertinent no-fault act provisions to determine the proper scope of coverage. And the Court did so in a case where the availability of PIP benefits turned on the very same question presented here: whether the claimant was an occupant of the insured vehicle at the time of the accident:

> Furthermore, we determined in *Royal Globe* [*Ins Co v Frankenmuth Ins Co*, 419 Mich 565 (1984)] that the purposes of the no-fault act would be better served "by the certainty and predictability that a literal construction of the word 'occupant' will yield, when it is assigned its primary and generally understood meaning." *Id* at 575. Therefore, we reaffirm our decision in *Royal Globe* that ***our task is to interpret the statute and not the policy***. Where insurance policy coverage is directed by the no-fault act and the language in the policy is intended to be consistent with that act, the language should be interpreted in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies.
>
> [*Rohlman*, 442 Mich at 530.]

Rohlman was not the first time this Court recognized that where an insurance policy is designed to reflect and implement the coverages mandated by Michigan's No-Fault Act, the language in the act should control whether there is coverage. In *McKenzie v Auto Club Ins Assn*, 458 Mich 214 (1998), the plaintiff sought PIP benefits for injuries he sustained when he was nonfatally asphyxiated while sleeping in a camper attached to his pickup truck. The Court

held that benefits were unavailable because §3105's requirement of an injury arising out of the use of a motor vehicle "as a motor vehicle" conditions coverage on the injury being closely associated with a vehicle's transportational function.

But the plaintiff in *McKenzie* argued in the alternative that the actual language used in his auto policy's "parked car" exclusion did not – as §3105 does -- specify use "as a motor vehicle" as a requirement for coverage. He claimed that this showed that the "coverage under the insurance policy is broader than that required by the no-fault act." *Id* at 226. This Court disagreed, noting language in the policy's insuring agreement reflecting the intent to provide coverage commensurate with that required by the no-fault act:

> We agree to pay only as set forth in the Code [defined as the Michigan No-Fault Law] the following benefits to or for an insured person who suffers accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle.
>
> [458 Mich at 226 (brackets in original, italics omitted).]

In the present case, this Court should likewise give effect to the parties' intention that the Hastings policy provide coverage commensurate with §3111 of the no-fault act, as reflected in the Michigan PIP Endorsement's statement that its provisions "are subject to the provisions of the Michigan Insurance Code." (See Policy, Michigan PIP Endorsement, at p 2, Apx at p 19A).

The *Rohlman* Court noted that in *Rohlman*, the plaintiff had not explicitly argued that the policy's definition of "occupying" provided coverage that was broader than that required under §3111. The Court therefore declined to decide whether the standard policy forms could rightfully be construed to provide more expansive coverage than that afforded by the no-fault act. But the Court's prudence in declining to address the "occupant" versus "occupying" question, where it was not specifically raised by the plaintiff, in no way negates the validity of

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

the Court's general observation that policy language designed to conform to Michigan's No-Fault Act should be interpreted based on the no-fault act itself, not individual policies.

In the present case, the Court of Appeals erred by ignoring that §3111 of the no-fault act governs the availability of PIP coverage for claimants injured in an out-of-state accident, such as the Ohio accident at issue in this case. The Hastings policy's standard ISO forms, and specifically the Michigan PIP Endorsement, are designed to embody the coverages defined in the no-fault act, including §3111. Therefore, the Court of Appeals should have applied and enforced §3111 to decide whether plaintiff was entitled to benefits in this case. As will be explained below, he was not.

B. This Court's Rohlman decision is controlling, and dictates that plaintiff was not "an occupant" entitled to PIP benefits under §3111 because he was not "physically inside" the insured vehicle when injured.

This Court's holding in *Rohlman* was unequivocal: In order to be "an occupant" of an insured vehicle for purposes of recovering PIP benefits for an out-of-state accident under §3111, the claimant must have been "physically inside" the insured vehicle when the accident occurred. 442 Mich at 531-532. This is the unavoidable conclusion when courts give the term "occupant its primary and generally-understood meaning." *Id* at 532.

Thus, in *Rohlman,* the plaintiff was not "an occupant" of a van when he was "some 10 to 20 feet away from the van from which he had departed" attending to a disconnected trailer. *Id* at 531.

Likewise, in *State Farm Fire & Casualty Co v Auto Club Ins Assn*, unpublished opinion per curiam of Court of Appeals decided June 18, 1999 (Docket No. 209325), the panel, applying this Court's holding in *Rohlman*, concluded that a plaintiff who had gotten out of the insured vehicle and walked around to the passenger side to unfasten his son's seat-belt, was not an "occupant" where it was undisputed that his "feet were on the ground at the time of impact."

Id. The fact that a portion of his upper body was "leaning inside" the insured vehicle did "not transform him into an occupant of the vehicle." *Id.*

In the present case the decision is an easy one. The test under §3111 is whether plaintiff was "physically inside" Mr. Tarchalski's car when he was struck by the hit-and-run driver. He was not. It is undisputed that plaintiff had gotten out of the car, had loosened the lug nuts on the driver's-side rear tire, and had gotten up to walk towards the back of the car, when he was hit. Plaintiff has acknowledged that he was not touching the car the moment he was hit. And plaintiff has never claimed that he was "physically inside" the car when he was hit. Therefore, he was not "an occupant" of the car when he was hit, and is not entitled to PIP benefits under §3111.

RELIEF REQUESTED

Defendant-appellant Hastings Mutual Insurance Company asks the Court to enter an order reversing the Michigan Court of Appeals' decision, and reinstating the trial court's order granting Hastings's motion for summary disposition.

COLLINS, EINHORN, FARRELL & ULANOFF, P.C.

BY: _____

J. MARK COONEY (P47114)
Attorney for Defendant/Appellant
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

Dated: November 12, 2002
F:\FILES\02\027503\UPDATED SC BRIEF.DOC

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

NICKOLAS REDNOUR,

Plaintiff/Appellee,

vs.

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant/Appellant.

Docket No. 119187

Court of Appeals No. 216025

Oakland County Circuit Ct
No. 98-004152-NF

ROBERT E. LOGEMAN (P23789)
JAMES A. IAFRATE (P42735)
Attorneys for Plaintiff/Appellee
2950 S. State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 994-0200

KEITH P. FELTY (P47406)
Attorney for Defendant/Appellant
30100 Telegraph Rd., Ste. 250
Bingham Farms, Michigan 48025
(248) 647-9595

J. MARK COONEY (P47114)
Co-Counsel for Defendant/Appellant
4000 Town Center, Suite 909
Southfield, Michigan 48075
(248) 355-4141

CERTIFICATE OF SERVICE

Beverly A. Sutherlin says that on the 12th day of November 2002, she served two copies of *Defendant/Appellant Hastings Mutual Insurance Company's Brief On Appeal* and *Defendant/Appellant's Appendix* on:

JAMES A. IAFRATE, 2950 S. State Street, Ste. 400, Ann Arbor, MI 48104

KEITH P. FELTY, 30100 Telegraph Rd., Ste. 250, Bingham Farms, MI 48025

by placing same in sealed envelope(s) with postage fully prepaid thereon, and depositing same in a United States Mail receptacle.

I hereby declare that the statement above is true to the best of my knowledge, information and belief.

Beverly A. Sutherlin

LAW OFFICES COLLINS, EINHORN, FARRELL & ULANOFF, P.C. 4000 TOWN CENTER STE 909, SOUTHFIELD, MI 48075 (248) 355-4141